

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WARREN C. RAMSEY,

Defendant-Appellant.

UNPUBLISHED

September 15, 2000

No. 213409

Wayne Circuit Court

LC No. 97-007601

Before: Hoekstra, P.J., and Cavanagh and White, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction for possession of an explosive material with the intent to use it unlawfully, MCL 750.211; MSA 28.408.¹ Defendant was sentenced to two to five years' imprisonment. We affirm in part, reverse in part, and remand for entry of conviction and resentencing under MCL 750.211a; MSA 28.408(1).

Complainants told police that defendant and two of his sons drove by their residence and that one of the sons pointed a handgun at them. Acting on this information, police placed defendant's residence under surveillance and, upon defendant's return, arrested him while he was entering the premise. During the arrest, the police noticed a molotov cocktail on top of a television located inside the front door of the house. Defendant subsequently was charged and convicted of possession of an explosive material with the intent to use it unlawfully, MCL 750.211; MSA 28.408.

Defendant's first claim is that the prosecution did not present sufficient evidence of both possession and unlawful intent. We disagree. In deciding a claim of insufficient evidence, this Court must determine whether a rational trier of fact could find that the elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515-516; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992); *People v Fetterley*, 229 Mich App 511, 515; 583 NW2d 199 (1998). The evidence must be viewed in the light most favorable to the prosecution.

¹ This statute has since been repealed by 1998 PA 208, effective October 1, 1998.

Wolfe, supra at 515; *Fetterley, supra*. A reviewing court abides by the credibility findings made by the trier of fact. *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999).

As in effect at the time of defendant's trial and conviction, MCL 750.211; MSA 28.408 provides:²

Any person who shall manufacture, buy, sell, furnish or cause to be furnished, or have in possession any nitro-glycerine [sic], dynamite, giant powder or any other dangerous explosive material, with the intent to use the same unlawfully against the person or property of another shall be guilty of a felony, punishable by imprisonment in the state prison for not less than 2 years nor more than 5 years.

In his appeal, defendant challenges the sufficiency of the evidence regarding his possession of the molotov cocktail and whether the facts established any unlawful intent if he did possess it. With regard to possession, it can be either actual or constructive, and also may be joint as well as exclusive. *People v Hill*, 433 Mich 464, 470; 446 NW2d 140 (1989). Constructive possession exists where the totality of the circumstances demonstrates a sufficient nexus between the defendant and an item. *Wolfe, supra* at 521. "[A] person has constructive possession if there is proximity to the article together with indicia of control." *Hill, supra*. An individual has control over an item if the individual has the recognized authority to possess the item. *People v Konrad*, 449 Mich 263, 271; 536 NW2d 517 (1995). Possession can be established through circumstantial evidence and reasonable inferences arising from that evidence. *Fetterley, supra*.

In addition to possession, this offense requires proof of an intent to use the explosive material unlawfully against the person or property of another. *People v Eichenberg*, 108 Mich App 578, 581; 310 NW2d 800 (1981). Intent can be inferred from the facts and circumstances. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999); *Eichenberg, supra* at 581-582; see also *Wolfe, supra* at 524; *People v Turner*, 213 Mich App 558, 568; 540 NW2d 728 (1995).

Upon review of the record, we are satisfied that sufficient evidence of constructive possession and unlawful intent was presented at trial. From its location on top of the television near the front entrance of the home and by its unusual nature and gasoline odor, it is nearly impossible to conceive that defendant or any other occupant would be unaware of the molotov cocktail's presence in the home. Further, there was evidence of defendant's presence in the home prior to his arrest and the seizure of the device. Because defendant was the owner of the residence, it is reasonable to infer that defendant had the recognized authority to possess the molotov cocktail. These circumstances, in our opinion, establish a sufficient nexus between defendant and the contraband from which it is reasonable to infer constructive possession. Moreover, we find defendant's reliance on defendant's son's statement that he found and brought the device to the home to be, at best, evidence of possible joint possession.

² See n 1.

Further, we find that the prosecution presented sufficient evidence of defendant's intent to use the molotov cocktail unlawfully against the person or the property of another. Complainants and defendant and his family lived in the same neighborhood and had a long-standing history of various altercations. The evening preceding defendant's arrest, windows in complainants' home were shot out. During the alleged drive-by and pointing of a handgun that led to the police arresting defendant on the day of the incident, one of defendant's sons was reported to have stated, "You want some more of what you got last night?" Because of the acrimonious nature of the relationship between defendant and complainants, and that it had once again resulted in hostilities between them, it is not unreasonable to conclude that the intent for possessing this molotov cocktail was to use it against complainants.

Defendant also argues that his conviction was against the great weight of the evidence. Defendant contends that the evidence preponderated heavily against a finding that defendant constructively possessed the molotov cocktail or intended to use the molotov cocktail unlawfully. We disagree. A verdict is against the great weight of the evidence where the evidence preponderates so heavily against the verdict that a miscarriage of justice would result if the verdict was not disturbed. *People v Lemmon*, 456 Mich 625, 642; 576 NW2d 129 (1998); *People v Gadomski*, 232 Mich App 24, 28; 592 NW2d 75 (1998). We review a trial court's decision in granting or denying a motion for new trial for abuse of discretion. *People v Hampton*, 407 Mich 354, 373; 285 NW2d 284 (1979); *Gadomski, supra*.

Here, after reviewing the evidence and the trial court's decision, we find no abuse of discretion. In the context of the ongoing altercation between defendant and complainants, the evidence logically connected defendant with possession of the molotov cocktail and its probable use in furtherance of defendant's pursuance of this inter-family dispute.

Defendant also argues that the prosecution abused its discretion by charging defendant under MCL 750.211; MSA 28.408 (§ 211), rather than pursuant to the more specific, and subsequently enacted, MCL 750.211a; MSA 28.408(1) (§ 211a). The prosecution conceded this argument in its brief on appeal, and we likewise agree. Section 211a, which deals with "any device which is designed to explode or which will explode upon impact or with the application of heat or a flame, or which device is highly incendiary,"³ is more specifically applicable to the charged conduct and was enacted more recently. Consequently, the prosecution abused its power, *People v Barksdale*, 219 Mich App 484, 488; 556 NW2d 521 (1996), by charging defendant under §211. *People v Patterson*, 212 Mich App 393, 394-395; 538 NW2d 29 (1995) ("Where two statutes prohibit the same conduct, the defendant must be charged under the more specific, most recently enacted statute."). Accordingly, we vacate defendant's conviction and sentence pursuant to §211 and remand for entry of conviction pursuant to § 211a and for resentencing in accordance with that conviction. *Patterson, supra*.

Defendant further argues that the trial court sentenced him, pursuant to § 211, under the mistaken belief that it did not have discretion to impose a sentence less than the mandatory sentence

³ This is the language contained in the statute at the time of defendant's trial and conviction, which has since been modified. See 1998 PA 206, effective October 1, 1998.

imposed by the statute. Because of our determination that the matter must be remanded for entry of conviction and resentencing under § 211a, this issue is moot.

Affirmed in part, and remanded for entry of conviction and resentencing consistent with this opinion.

/s/ Joel P. Hoekstra
/s/ Mark J. Cavanagh
/s/ Helene N. White